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ORIGINAL

Supreme Court, U.S.
FILED
AUG 22 1997
CLERK

No. 96-1962

In the Supreme Court of the United States

October Term, 1996

Sylvia Cohen,

Petitioner,

vs.

Little Six, Inc., a foreign corporation,
d/b/a Mystic Lake Casino,

Respondent.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

Respondent's Motion for Rule 11 Sanctions

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (612) 893-1813
ATTORNEY FOR RESPONDENT

10 pp

TO: Petitioner Sylvia Cohen and her attorney, Mr. Gregory A. Abbott, **Abbott & Baruch, Ltd.**; Offices at Centre Village, 431 So. Seventh Street, Suite 2424, Minneapolis, MN 55415.

PLEASE TAKE NOTICE that the above-named Respondent, pursuant to Rule 11 of the Federal Rules of Civil Procedure ("F.R.C.P."), hereby moves this Court for an order sanctioning Petitioner's attorney, Gregory A. Abbott, for asserting false statements of law to this Court, for making legal contentions that are unsupported by any statutory or decisional authority, and for misleading the tribunal. As sanctions, Respondent respectfully requests attorney's fees incurred in preparing this Motion, and attorney's fees incurred in preparing Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

DISCUSSION

As illustrated by the model rules, attorneys are generally prohibited from making "a false statement of . . . law to a tribunal." ABA Mod. R. Prof. Cond. 3.3(a)(1). Further, attorneys owe a duty of candor to federal tribunals, which requires them "to conduct a reasonable inquiry into the law . . ." before submitting a paper to a court. F.R.C.P. 11, 1993 Advisory Committee Notes. Rule 11 requires an attorney filing a pleading, motion or other paper with a tribunal to certify "that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . [the] claims . . . and other legal contentions therein are warranted by existing law . . . ." F.R.C.P. 11(b)(2).

In the Petition, Counsel states as fact that "tribal sovereign immunity exists by virtue of Congressional action . . . . " Petition at 19. This is an outright

misstatement of existing law, as evidenced by the failure of Petitioner's counsel to provide *any* statutory or decisional authority for this assertion. The reason for failing to cite to a Congressional act or any case in support of this position is obvious - the statement is false, and absolutely *no authority* in support of this statement exists.

Since this misstatement of law is the foundation of all of Petitioner's arguments, it is clear that Petitioner's misstatement of law was deliberate and intended to mislead and confuse the Court. Petitioner argues that Congress "has established a statutory scheme permitting Indian tribes, and no other group, to assert sovereign immunity as a defense in all civil cases." Petition at 19. Consequently, Petitioner asserts that this Court must apply a strict level of scrutiny to determine if sovereign immunity is narrowly tailored to meet a compelling governmental interest. Petition at 19.

Tribal sovereign immunity does not exist by virtue of Congressional action, however. *See* Response to Petition. Rather, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted). Although tribal sovereign immunity is subject to the plenary control of Congress, Martinez, 436 U.S. at 58, tribal sovereign immunity was not *created* by Congress. Since Congress has not established a statutory scheme respecting tribal sovereign immunity, as Petitioner's counsel asserts, there is no basis

for review by a federal court of any congressional act in the context of this case. In short, there is nothing to which a strict scrutiny standard of review can be applied.

Either Petitioner's counsel completely ignored those portions of cases he cited that contain propositions in direct opposition to the argument he advanced (intentional misrepresentation of the law), or he failed entirely to read the cases cited (negligent misrepresentation of the law). For example, on the page that Petitioner's counsel cites for the proposition that "[t]ribal sovereign immunity exists by virtue of Congressional action," Rice v. Rhener states that "'[t]he sovereignty that the tribes *retain* is of a unique and limited character.'" 463 U.S. 713, 719 (1983) (emphasis added). Rice, in turn, quotes United States v. Wheeler, which states, also on the *exact page* Petitioner's counsel cites for the proposition that tribal sovereignty was conferred by Congress:

> But our cases recognize that the Indian tribes *have not given up* their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a good deal more than 'private, voluntary organizations.'" (internal citations omitted). The sovereignty that the Indian tribes *retain* is of a unique and limited character. . . . *But until Congress acts, the tribes retain their existing sovereign powers.*

435 U.S. 313, 323 (1978). Most remarkably, Petitioner's counsel cites the leading case recognizing the inherent nature of tribal sovereign immunity *for the opposite proposition*. Again, on the page cited by Petitioner's counsel, Santa Clara states that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." 436 U.S. 49, 58 (1978).

Elsewhere, Santa Clara recognizes that "Indian tribes are 'distinct independent political communities, *retaining* their original and natural rights' in matters of local self-government." Id. at 55 (emphasis added, internal citations omitted).

CONCLUSION

Petitioner's attorney violated his duty of candor to this Court by submitting a paper containing a clear misstatement of law. He then compounded this transgression of Rule 11 by constructing a legal argument based entirely on this intentional misstatement, thereby seeking to mislead the Court. There can be no doubt that Petitioner's counsel intentionally advanced an argument for which there is no support in the law, and for which ample decisional authority exists which directly contradicts the position advanced.

As an appropriate sanction, Respondent Little Six, Inc. requests attorneys fees incurred in preparing this Motion and in responding to Appellant's misstatement of law in the Petition. In support of this Motion, Respondent attaches an affidavit indicating the amount of attorney time spent preparing this motion and responding to Appellant's misstatement, and the hourly attorney rate.

Dated: August 22, 1997

Respectfully submitted,

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 5000
5001 West 80th Street
Minneapolis, MN 55437
(612) 893-1813
ATTORNEY FOR RESPONDENT

AFFIDAVIT OF STEVEN F. OLSON

I, Steven F. Olson, being first duly sworn, do hereby depose and state:

1. I am Respondent's Counsel of Record in the matter of *Cohen v. LSI*, on Petition for Writ of Certiorari to the Minnesota Supreme Court.

2. I have read and responded to the arguments made by Petitioner's counsel, Gregory A. Abbot, in the Petition for Writ of Certiorari.

3. It is my belief that the assertion of Petitioner's counsel that "[t]ribal sovereign immunity exists by virtue of Congressional action," Petition at 19, upon which the entire Petition is based, is blatantly false, intentionally misleading, and in violation of Rule 11 of the Federal Rules of Civil Procedure.

4. The attached table correctly states the hourly rate and the amount expended in response to the Petition and in making the attached Motion for Rule 11 Sanctions. The table is derived from contemporaneous time records, created by the attorneys involved and maintained by the Office Administrator of BlueDog, Olson & Small, P.L.L.P.

Dated: August 22, 1997

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 5000
5001 West 80th Street
Minneapolis, MN 55437
(612) 893-1813
ATTORNEY FOR RESPONDENT

County of Hennepin }
}ss.
State of Minnesota }

Subscribed to and sworn before me
this _____ day of August, 1997

_____
Notary Public

ATTORNEY	HOURS	RATE	AMOUNT
STEVEN F. OLSON	39.10	250.00	9775.00
VANYA HOGEN-KIND	.20	200.00	40.00
JACK BLAIR	46.60	150.00	6990.00
JANET ERICKSON	3.60	150.00	540.00
TOTALS:	89.50		$17345.00

ABBOTT & BARUCH, LTD. ATTORNEYS AT LAW

Gregory A. Abbott*

*ALSO ADMITTED IN TEXAS

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AUGUST 21, 1997

Via regular U.S. mail and fax (893-0650)

Steven F. Olson
BLUEDOG, OLSON & SMALL
5001 West 80th Street
Minneapolis, Minnesota 55437

RE: ***Cohen v. Little Six, Inc., et al.***

Dear Mr. Olson:

I hereby decline the invitation contained in your letter of July 31, 1997, to withdraw or correct our Petition for Writ of Certiorari in the above-captioned case.

As a fair warning and professional courtesy, I have two points for you to consider prior to the filing of your Rule 11 Motion.

First, you yourself have incorrectly cited precedent to the Court. I refer to your assertion that " . . . *Adarand* [is] a split opinion with no majority reasoning . . ." at page 17 of your Brief in Opposition. This statement is false: Justice O'Connor was writing for the Court, with the agreement of five Justices. The fact that *Adarand* is a formal opinion of the Court is precisely what distinguishes it from *Bakke*, and makes it noteworthy.

Second, your Rule 11 Motion is based on the incorrect premise that our Petition is frivolous in its entirety because of our "false" arguments. However, we have exactly the same grounds to seek review as in *Gavle*, and we cite those independent grounds on pages 23 to 24 of our Petition. Even assuming your arguments are true (an assumption I most emphatically reject), the Petition itself is not frivilous because we have valid and independent grounds to seek review. I presume that no Rule 11 Motion has been filed against Craig Greenberg for his Petition in *Gavle*. Your Motion therefore grossly overstates both the alleged violation and costs incurred as a result of the alleged violation.

Please take notice that these points may form the basis for a Counter-Motion for Sanctions.

Sincerely,

Gregory A. Abbott

cc: Clinton C. Collins, Jr.

CERTIFICATE OF SERVICE

I, Christene L. Bazinet, certify that on August 22, 1997, I mailed via U.S. Mail, postage prepaid, a copy of this MOTION FOR RULE 11 SANCTIONS to the following:

Mr. Gregory Abbott
Abbott & Baruch, LTD.
2424 Centre Village
431 South Seventh Street
Minneapolis, MN 55415

Christene L. Bazinet